(3)

No. 91-841

In The

Supreme Court of the United States

October Term, 1991

THE STATE OF COLORADO,

Petitioner,

vs.

ROBIN AULD,

Respondent.

Petition For Writ Of Certiorari To The Colorado Court Of Appeals No. 89CA0995

REPLY TO BRIEF IN OPPOSITION TO CERTIORARI

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ARGUMENT

Respondent, in his Brief in Opposition, essentially presents two objections to the Court's issuing a Writ of Certiorari: (1) that the issues raised in the Petition were not preserved, and (2) that the issues raised were decided on the basis of the Colorado Constitution. Even a cursory reading of the opinion of the Colorado Court of Appeals in this case demonstrates that the issues raised in the Petition were addressed and decided by that court. Additionally, the ruling of the Court of Appeals is *not* expressly (or even impliedly) an application of state constitutional law. Thus, this Court's decision in *Michigan v. Long*, 463 U.S. 1032 (1983), is dispositive of the Respondent's jurisdictional objection.

In his brief, the Respondent confuses due process arguments concerning entrapment and attorney-client privilege, which were rejected by the trial court and *not* the subject of the appeal, with the outrageous governmental misconduct/due process issue decided by the Court of Appeals in this case. To further support his "failure to preserve" argument, the Respondent would have this Court view the Court of Appeals' decision as some sort of state court disciplinary procedure. This was a criminal case, not a disciplinary proceeding. As indicated in the Petition, there were independent disciplinary proceedings taken by the Colorado Supreme Court arising from the facts of this case. In its opinion below, the Colorado Court of Appeals expressly relies upon the outrageous governmental misconduct/due process doctrine established by this Court in *United States v. Russell*, 411 U.S. 423 (1973). (See Pet. App. 3-4.)

Respondent cites state court powers and the state constitution numerous times in his brief. However, the Colorado Court of Appeals makes no mention of state court powers or the state constitution anywhere in its opinion.

In *Michigan v. Long*, 463 U.S. 1032 (1983), this Court made clear that state court decisions which appear to rely primarily on federal law will be presumed *not* to have independent state grounds, absent an express indication that the federal cases cited are being used merely for the purpose of guidance and do not themselves compel the result. This Court made the following statement: "Accordingly, when, as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law grounds is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so." *Michigan v. Long*, 463 U.S. 1040-1041.

As previously noted, the Colorado Court of Appeals, from the outset, bases its opinion on the outrageous governmental misconduct/fundamental fairness doctrine of *United States v. Russell*, 411 U.S. 423 (1973). The Court of Appeals goes on to state that this doctrine has been recognized and discussed in two Colorado cases, *Bailey v. People*, 630 P. 2d 1062 (Colo. 1981) and *People in Interest of M.N.*, 761 P. 2d 1124 (Colo. 1988). Both the Colorado Court of Appeals and the trial court cite, as additional authority, the case of *United States v. Omni International Corp.*, 634 F. Supp. 1414 (D. Md. 1986). The Colorado

Constitution is not mentioned in either the district court's or the appellate court's decision, and nowhere does the Court of Appeals even suggest that its holding rests upon state grounds.

In support of his independent state grounds argument, the Respondent has cited a number of cases, all of which are inapposite. *Dreyer v. Illinois*, 187 U.S. 71 (1902), *Sweezy v. New Hampshire*, 354 U.S. 234 (1957), and *Highlands Farm Dairy v. Agnew*, 300 U.S. 608 (1937), all involved state statutes which allegedly shifted the powers of one branch of state government to another. *May v. Supreme Court of State of Colorado*, 374 F. Supp. 1210 (D. Colo.), aff'd., 508 F. 2d 136 (10th Cir. 1974), involved a state supreme court rule which required attorneys to pay registration fees. *International Brotherhood v. Hanke*, 339 U.S. 470 (1950) involved the review of a Washington Supreme Court ruling which was expressly based upon questions of state policy. All of these cases involved matters exclusively of state concern.

CONCLUSION

The Respondent's argument that this case was decided upon "uniquely state constitutional doctrines" is simply not supported by the opinion itself. As written, the Colorado Court of Appeals opinion misapplies this Court's decision in *United States v. Russell*, 411 U.S. 423 (1973). The Respondent's argument that this case is "fact-bound" and will not impact other prosecutions is, at best, inaccurate, and, at worst, disingenuous. This case has been and will continue to be cited for the proposition

that a court may dismiss a criminal prosecution upon a showing of outrageous governmental misconduct wholly unrelated to any constitutionally protected right of the defendant. Accordingly, the Petitioner respectfully requests that this Court issue a Writ of Certiorari.

Respectfully submitted,

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